



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1445 OF 2014

KUDHEIHA WORKERS..... APPLICANT

VERSUS

THE BOARD OF GOVERNORS OF NEMBU .

GIRLS HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The suit was filed on 13th October, 2014 by the union on behalf of the grievant **Agnes Kabunyi**.
2. The claimant prays for various reliefs arising from the termination of the grievant by the respondent on 10th August, 2012 including:-
 - (a) *Underpayments in the sum of Kshs 3,794.*
 - (b) *Medical allowance in the sum of Kshs 3,315*
 - (c) *Notice as per Clause 6(a) of the Collective Bargaining Agreement being gross salary of Kshs 22,777 x 3 months Kshs 68,331.*
 - (d) *Service gratuity in terms of Clause 31(a) (i) of the Collective Bargaining Agreement from the period 1997 to 2012 (being ½ month salary for 15 years completed service) Kshs.262,905 commuter allowance in the sum of 65,200.*
 - (e) *Leave travelling allowance for six (6) years from 2006 to 2012 - Kshs 24,000 and*
 - (f) *Compensation for unfair termination of employment equivalent to 12 months' salary.*
3. The grievant testified that she was employed by the respondent on 1st October, 2007 as a Lab Technician in Job group E. That she was issued a letter of appointment which was produced before Court as exhibit '4'
4. That she was a member of the union and her terms were regulated by the Collective Bargaining Agreement between the claimant union and the respondent. That the terms were also subject to the Ministry of Education guidelines on Board of Management issues from time to time That in 1988, the grievant was confirmed in her position.
5. The Grievant testified that she was terminated from employment without being given opportunity to be heard. That she did not receive a purported notice to hearing dated 20th December, 2012. That the letter has no address and so it was not received by her. That she was not paid any terminal benefits upon termination.
6. That the purported warnings given to her had expired in terms of the Collective Bargaining Agreement because 290 days had lapsed since the warnings were given to her.
7. The grievant testified that she was wrongly accused of absence from work and insubordination in that she had failed to open the science laboratory upon being requested to do so.
8. She testified that on the material day, she was not supposed to be at school. That the teachers and the Principal had their keys for the lab and so it was wrong to accuse her of not being available to open the lab.

9. The grievant testified that she was underpaid. That she was supposed to be in job Group G. That she had a basic salary of Kshs.13,733. That she was wrongly placed in Job group E contrary to the Collective Bargaining Agreement since she was in professional cadre. That persons in Job Group G earned a basic salary of Kshs.16,692. The grievant produced union membership card and attached evidence of subscriptions payments.

10. The claimant stated that she served the school for a period of 15 years. The Grievant prays that she be paid terminal benefits and compensation as set out in the Statement of Claim. That the Grievant reported the grievance against the respondent through the union. That the respondent failed to hear her when she went to the school with a union representative. That the termination was unlawful and unfair.

11. The grievant was subjected to close cross-examination by Mr. Were Advocate for the respondent. The grievant stated that the employment was in September, 1997 and the termination was in July, 2012. That she had a good work relationship with the employer. That she had no issues with various management. That she had responded to various warning letters given to her. That the issues raised included reporting late at school. That these involved minor issues which were amicably resolved. That she got prizes for good performance. That she did not receive any letter regarding matters that led to her termination. That she did not know how the notice was delivered to her if at all. C.W.1 reiterated that she was a member of the union and was entitled to terms and conditions of service negotiated between the union and the respondent. That her gross salary was Kshs.17,928 and her basic salary was Kshs.13,733 which was underpayment. That the Scheme of Service for Lab Technicians is clear on what her current salary should have been. That Ministry of Education Circulars guided this matter. That the letter of her appointment referred to the Collective Bargaining Agreement terms. That she had a Certificate in Laboratory Technology. That the scales of Lab Technicians also guided the Collective Bargaining Agreement and she ought to have been placed in Job Group G. C.W.1 stated that she be awarded as prayed in her Statement of Claim.

12. R.W.1 Joy Gitonga the present Principal of the respondent testified. She relied on a Witness Statement dated 19th October, 2018 as her evidence in Chief. R.W.1 testified that she knew the grievant only by her records but not personally. That from the records, C.W.1 had no cordial relationship with the school. That she had received 7 warning letters on various issues. That C.W.1 was invited to a disciplinary hearing before the termination of her employment but she failed to attend the hearing. That C.W.1 did not communicate to the school. That her termination was due to rudeness, disrespect, lateness and insubordination. That the termination was justified. That the suit be dismissed with costs.

13. Under cross-examination, R.W.1 stated that she was secretary to the Board of Management and that the Board of Management negotiated terms of Service of its employees with the union. That the Collective Bargaining Agreement terms are applicable to the grievant.

14. R.W.1 agreed that warning letters given to employees expired after 270 days and ceased to be of any effect. R.W.1 agreed that the warning letters relied upon by the respondent had expired and ought to have been cancelled. R.W.1 admitted that the entry point for a Lab Technician in terms of the Collective Bargaining Agreement was Job Group G. R.W.1 admitted that C.W.1 should have been paid on Job Group G.

15. R.W.1 stated that she was not aware that the termination of C.W.1 was due to failure to open a science laboratory for a teacher, when she was lawfully out of the school and the teacher had their own key to the Lab. R.W.1 admitted that the notice to attend the hearing that led to the termination had the school address and that C.W.1 was not at the school at the time the letter was written. R.W.1 admitted that there was no evidence before Court to show that C.W.1 received the letter or was called via telephone to attend the hearing. R.W.1 admitted that the purported minutes of a hearing before termination of her employment were not signed by any person.

16. R.W.1 stated that she had no personal knowledge of circumstances that led to the termination of employment of C.W.1 but her testimony was solely based on records available to her.

Determination

17. The parties filed written submissions and the issues for determination are:-

(a) Whether the respondent had a valid reason to terminate the employment of the grievant and whether the respondent followed a fair procedure to terminate her employment.

(b) Whether the grievant is entitled to the reliefs sought.

Terminal benefits

18. The testimony by C.W.1 is that she was employed in the position of a Lab Technician by the respondent for a period of 15 years. This testimony is not in dispute. It is not in dispute that C.W.1 was a qualified Lab Technician and the entry point for this cadre was job Group G. It is not in dispute that C.W.1 was placed in Job Group E during her tenure and that she was therefore underpaid. R.W.1 admitted these facts. R.W.1 did not offer any testimony to dispute non-payment of all the terminal benefits claimed by C.W.1. The Court finds the evidence tendered by C.W.1 regarding non-payment of the claimed terminal benefits cogent, credible and therefore reliable.

19. The Court finds in favour of the claimant in respect of all the terminal benefits set out in the Statement of Claim and in this judgment and awards the claimant accordingly.

Compensation

20. With regard to whether the respondent had a valid reason to terminate the employment of the C.W.1, R.W.1 failed to demonstrate to the Court that the respondent offered C.W.1 any opportunity to explain allegations made against her in a letter dated 10th August, 2012. R.W.1

failed to demonstrate that the said letter was even received by the grievant. R.W.1 did not have any knowledge regarding the allegations made against C.W.1 and failed to discharge the onus placed on the respondent in terms of Sections 41, 43(1) and (2) 45, and 47 of the Employment Act, 2007.

21. Accordingly, the Court finds that C.W.1 ably demonstrated that the termination of her employment was unjustified and discharged the onus placed on her in terms of Section 47(5) of the Act.

22. Accordingly, the Court finds that the termination of the Employment of C.W.1 was unlawful and unfair.

23. The Court relies on the Supreme Court decision in **Kenfreight (E.A) Limited –vs- Benson K. Nguti [2019] eKLR** in which the Court held

“[34] (a) “As to whether the Appellant’s summary dismissal of the Respondent was lawful or whether it amounted to unfair termination of services it held that the burden of justifying the ground of summary dismissal lies upon an employer, and that the Appellant failed to prove that the Respondent used abusive language towards the Human Resource Manager, consequently, dismissing the Respondent summarily. The Court agreed with the trial Court that the Respondent was entitled to an opportunity to be heard in any event.”

24. The Supreme Court upheld the decision of the trial Court and proceeded to deal with the issue of compensation in terms of Section 49(1) (c) and (4) of the Employment Act, 2007.

25. This decision applies equally in this case, and the Court finds that there was no evidence that C.W.1 had insubordinated the respondent and or was rude to the respondent teacher as alleged or at all.

26. The Court finds that the C.W.1 is entitled to compensation for the unlawful and unfair termination of employment in terms of Section 49 of the Employment Act, 2007. In this respect, the Supreme Court in Kenfreight (*supra*) guided thus:-

“Guided by the above analysis, we find that once a Court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is one provided under Section 49 of the Employment Act. We also need to clarify that a payment of an award in Section 49(1) (a) is different from an award under Section 49(1) (b) and (c). Section 49 allows an award to include any or all of the listed remedies and that a Court in making the award exercises its discretion judiciously and is guided by Section 49(4) M.

27. In the present case, the grievant had served the respondent for a period of 15 years. The grievant’s employment was terminated for no valid reason and so she did not contribute to the termination. The Grievant was not paid any terminal benefits upon termination of employment. The Grievant was underpaid for the entire term of her employment. The grievant has suffered loss and damage and was not compensated for the loss of employment without notice and or fair hearing.

28. The Grievant had not found alternative employment as at the time of the hearing. The Court relying on the decision of the Supreme Court in **Kenfreight** (*supra*) awards the grievant the equivalent of 12 months’ salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs 273,324.

29. In the final analysis, the Court awards the grievant as against the respondent Kshs.700,869 being the proved unpaid terminal benefits and compensation for the unlawful and unfair termination of employment.

30. The award is payable with interest at court rates from date of judgment till payment in full.

31. The respondent to pay the costs of the suit.

Dated and delivered at Nairobi (virtually) this 27th day of January, 2022.

Mathews N. Nduma

Judge

Appearances

Mr. Maina for Claimant

Mr. Were for Respondent

Ekale – Court Assistant